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COURT OF CRIMINAL APPEALS
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COURT OF CRIMINAL APPEALS
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In the
Court of Criminal Appeals

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No. 14-13-00923-CR
In the Court of Appeals for the
Fourteenth District of Texas at Houston

———♦———

No. 1326559
In the 178th District Court of
Harris County, Texas

———♦———

GAREIC JERARD HANKSTON
Appellant
V.
THE STATE OF TEXAS
Appellee

———♦———

STATE'S COURT-ORDERED BRIEF ON REMAND

———♦———

KIM OGG
District Attorney
Harris County, Texas

ERIC KUGLER
Assistant District Attorney
Harris County, Texas
TBC No. 796910
kugler_eric@dao.hctx.net

1201 Franklin, Suite 600
Houston, Texas 77002
Tel.: 713-274-5826

Counsel for Appellee

STATEMENT REGARDING ORAL ARGUMENT

This Court has requested supplemental briefing on remand but has not ordered additional oral argument. The State does not believe that argument is necessary to the resolution of the remaining issues.

IDENTIFICATION OF THE PARTIES

Counsel for the State:

Kim Ogg — District Attorney of Harris County

Eric Kugler — Assistant District Attorney on appeal

Britni Cooper — Assistant District Attorney at trial

Appellant or criminal defendant:

Gareic Jerard Hankston

Counsel for Appellant:

Angela Cameron — Counsel on appeal

Brent Mayr; Christopher Morton — Counsel at trial

Trial Judge:

Hon. David L. Mendoza — Presiding Judge

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STATEMENT OF THE CASE

The appellant was charged with the murder of Keith Brown; a jury found him guilty and assessed punishment at twenty years in prison (CR – 14, 180). The court of appeals affirmed the conviction, holding that neither the Fourth Amendment nor the Texas Constitution prohibited the State from acquiring his cell tower data by "subpoena." *Hankston v. State*, 14-13-00923-CR, 2015 WL 3751551 (Tex. App.—Houston [14th Dist.] June 16, 2015).

This Court denied review of the federal issue but granted review on the state law ground and affirmed the conviction. *Hankston v. State*, 517 S.W.3d 112, 113 (Tex. Crim. App. 2017). As this Court recounted at the beginning of its opinion, it "did not grant review of Appellant's Fourth Amendment claim. We did, however, agree to address…whether Art. I, § 9 of the Texas Constitution affords broader protection under these facts than the Fourth Amendment provides." *Hankston*, 517 S.W.3d at 113 (footnote omitted). This Court held that "the State's acquisition of Appellant's cell phone records pursuant to a court order did not violate Art. I, § 9 of the Texas Constitution." *Id.* But the United States Supreme Court remanded for "further consideration in light of *Carpenter v. United States*, 138 S.Ct. 2206 (2018)." *Hankston v. Texas*, 138 S. Ct. 2706 (2018).

GROUND FOR REVIEW ON REMAND

Did the Court of Appeals err when it "utilize[d] Fourth Amendment precedent" in determining Art. 1 Section 9 of the Texas Constitution was not violated when the State obtained Appellant's cell phone records without a warrant in light of *Richardson v. State*, 865 S.W.2d [9]44 (Tex. Crim. App. 1993) [and in light of *Carpenter v. United States*, 138 S.Ct. 2206 (2018)]?

STATEMENT OF FACTS

The appellant started dating Crystal Jordan when she was in the eleventh grade; they had a daughter together (RR. X – 10). Jordan's parents lived on Groton Street, just two houses down from Keith Brown's house (RR. X – 11-12). The appellant lived with his parents on Jutland Street, which was about seven minutes away from Brown's house (RR. X – 21-22).

Brown was married with four children ranging in ages from five to seventeen, one of whom was named Malik (RR. VIII – 161). Brown was the primary caretaker of his children because his wife worked for the Internal Revenue Service (RR. VIII – 162-163). But Brown also had a drug problem, which was a source of tension with his wife (RR. VIII – 165).

Brown would sometimes engage in harassing behavior toward Jordan, which included watching her as she washed her car, obstructing her car on the street, and asking if she needed help with her groceries (RR. X – 14-15). Jordan's father had once found Brown's cell phone outside of Jordan's window, and that made her feel

scared (RR. X – 16). But Brown never displayed a weapon, never threatened Jordan, and never touched her (RR. X – 26). And Jordan never called the police (RR. X – 25-26). Nevertheless, the appellant knew about this harassing behavior, and he was not happy with the situation (RR. X – 16, 27, 351).

Around January 2011, Jordan moved out of her parents' house and into an apartment (RR. X – 21). She later had contact with Brown at her apartment complex on two occasions (RR. X – 23-24). The second occasion was on May 19, when Jordan heard a knock on her door (RR. X – 24-25). Jordan did not open the door; she asked who was there, but there was no answer (RR. X – 31). Jordan called the police, her parents, and the appellant (RR. X – 31-32). She asked people at the apartment complex about the situation, and they described the knocker as a person who Jordan believed to be Brown (RR. X – 30). The appellant was not happy with the way that the police officers were handling the investigation, and they told him to be quiet (RR. X – 39-40). The officers told Jordan that nothing could be done because no crime had been committed (RR. X – 42-43).

On the evening of May 19, Brown had been abusing drugs, including PCP; he was slow and unresponsive with his wife (RR. VIII – 170-171) (RR. X – 142) (RR. XI – 125) (St. Ex. 78). They were arguing in the front yard as a man in jeans and a sleeveless t-shirt walked down the street toward them; Brown's attention was focused on that man (RR. VIII – 172, 174, 176). As Brown's wife walked into the

house, Brown put his foot in the door and said, "don't leave [me] out there." (RR. VIII – 178).

A few minutes later, Malik was in the front room of the house watching television with his sister and little brother (RR. IX – 110). As Brown was sweeping in that room, there was a loud banging on the front door (RR. VIII – 180-181) (RR. IX – 20, 113). Malik saw that it was the appellant, who was standing outside the house with a black pistol (RR. IX – 120-122, 126, 136-137) (RR. XI – 170-172). The appellant looked straight at Malik and made eye contact with him (RR. IX – 127-128, 189). The appellant was wearing a white tank top and blue jeans, and there were two other people with him (RR. IX – 121, 130). Malik told his brother and sister to hide, and got under the bed in his bedroom (RR. IX – 140).

Brown asked who was banging on the front door, and someone said, "Your son-in-law, Chad." (RR. VIII – 182) (RR. IX – 21, 115-116, 124). But Brown did not have a son-in-law named Chad; he had a friend named Chad who he had not seen for at least several months if not a couple of years (RR. VIII – 182) (RR. XI – 208-216). Brown looked through the blinds on the window next to the front door and turned off the light on the front porch (RR. VIII – 183-185) (RR. IX – 22-23).

Brown opened the front door about nine inches, and his wife could see that someone was out there; but Brown started pushing back against the door (RR. VIII – 186) (RR. IX – 25). At that moment, gunshots rang out (RR. VIII – 186).

Despite the hail of bullets, Brown was able to close the front door and lock it (RR. IX – 26).

Six bullets passed through the front door, and Brown was hit by four of them (RR. X – 129, 169) (RR. XI – 152) (St. Ex. 40-43, 78). Two bullets went straight through his right and left thighs, respectively, without impacting major organs (St. Ex. 78) (RR. X – 136-140). A third bullet grazed his right forearm (RR. X – 140) (St. Ex. 78). But the fourth bullet penetrated his left hip and then pierced his colon, his liver, his stomach, and his heart (RR. X – 129, 131-135) (St. Ex. 78).

Brown's wife ran into the bedroom to get away from the shooting (RR. VIII – 187) (RR. IX – 26). He crawled after her, exhaled two long breaths, and died (RR. VIII – 188) (RR. IX – 145-146). Brown's wife heard some tires screeching off (RR. IX – 27). Meanwhile, one of his older sons called 911 at precisely 9:32 p.m. (RR. VIII – 190) (St. Ex. 76). The police arrived approximately fifteen minutes later (RR. IX – 19).

Michael Burrow and M. Condon with the Houston Police Department's homicide division were dispatched to the scene; they investigated the physical evidence and interviewed witnesses (RR. X – 158, 163, 330) (RR. XI – 147). There were no shell casings, which indicated that the shooter used a revolver (RR. VIII – 83-86) (RR. X – 170). The physical evidence and witness statements led them to believe that the murder was personally motivated (RR. X – 191). They

also broadcast a description of the suspect: "bald, black male, 5-8 to 6 foot…Thin build, wearing a white muscle shirt, driving a burgundy Honda Civic, possibly a 2000 or 2006 model." (RR. X – 184). The appellant fit that general description; he was not bald, but he had a very closely-cropped haircut (RR. X – 351-352). He also drove a burgundy Honda Accord (RR. X – 45, 48-49).

Neither the appellant nor Jordan were at the scene when the police arrived (RR. X – 187-188). But after a few false leads, Condon eventually interviewed Jordan's brother and Jordan herself (RR. X – 317-321). Jordan stated that she was at her parents' house when she heard the gunshots; she did not know where the appellant was at that time (RR. X – 58-59). She never asked the appellant whether he killed Brown because she did not want to know (RR. X – 103). The police prepared a photo lineup of the appellant, and Malik picked the appellant out of it (RR. IX – 163-168) (RR. X – 332). When the appellant was arrested and taken to the police station, he was nonchalant (RR. X – 338-339).

The cell phone call logs showed that the appellant and Jordan had "quite a bit of activity" between them after Jordan called 911 on the night of the murder (RR. X – 344). They had no cell phone contact between 8:48 p.m. and 9:16 p.m. (RR. X – 344). And there was a lull in the activity between 9:24 p.m. and 9:32 p.m. (RR. X – 345) (RR. XI – 289). But then there was a burst of activity starting at 9:32 p.m., which was precisely when the murder call was placed to 911 (RR. X –

345) (RR. XI – 289) (St. Ex. 76). In fact, there were 38 communications sent between the appellant and Jordan in the 23 minutes after 9:32 p.m. (RR. X – 345). That was the busiest 23 minutes of activity for the appellant in seven months' worth of phone records (RR. X – 345-346) (RR. XI – 312).

The appellant's cell phone was using a relay tower in the vicinity of the murder from 8:52 p.m. until 9:32 p.m. on the night of the murder (RR. XI – 284, 304-305). At 9:32 p.m., the appellant's cell phone started moving east and then southward, which was consistent with the location of the appellant's parents and where the appellant himself was living (RR. XI – 297-300). This cell phone information contradicted the appellant's claims of where he was on the night of the murder (RR. XI – 64).

SUMMARY OF THE ARGUMENT

This Court has already decided that rights pertaining to call logs and cell site location information (CSLI) possessed by a third party are the same under both the Fourth Amendment of the federal Constitution and under Article I, Section 9 of the Texas Constitution. *Hankston*, 517 S.W.3d at 113. But the United States Supreme Court subsequently raised the bar of the Fourth Amendment in the context of CSLI, which necessarily raises the bar of Article I, Section 9.

The issue before this Court is whether the Texas Constitution now requires a search warrant for the seizure of CSLI. It generally does. But unlike the Fourth Amendment, the Texas Constitution does not contain its own exclusionary rule. Rather, Texas has a statutory exclusionary rule. Therefore, any harm analysis under the Texas Constitution must be for non-constitutional error. And in light of the strong evidence of guilt from numerous sources—including the call logs—the admission of the appellant's CSLI did not have a substantial, injurious effect or influence in determining the jury's verdict.

ARGUMENT

The appellant filed a pre-trial motion to suppress, which claimed that a law enforcement agency obtained his cell tower data without a search warrant (CR – 100-105). The trial court held a pre-trial hearing on that motion during which no witnesses testified (RR. IV – 4). During the hearing, the trial court inspected the court order, filed under seal, which allowed the State to obtain the appellant's cell phone records, including both his call logs and cell site location information (CSLI) (RR. IV – 6) (Ct. Ex. 1). The trial court unsealed the order for the appellant, but delayed ruling on the motion to suppress until the day before trial, at which time it denied the motion (RR. V – 6) (RR. VI – 8-11) (CR – 102).

In reviewing a trial court's ruling on a motion to suppress, a reviewing court must give almost total deference to a trial court's determination of historical facts that are supported by the record and to its determination of mixed questions of fact and law that turn on an evaluation of credibility and demeanor. *See Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). The appellate court reviews *de novo* mixed questions of law and fact that do not turn on an evaluation of credibility and demeanor. *See id*. And the appellate court reviews the evidence in the light most favorable to the trial court's ruling. *See Carmouche v. State*, 10 S.W.3d 323, 327-28 (Tex. Crim. App. 2000).

If the trial court's ruling regarding a motion to suppress is reasonably supported by the record and is correct under any theory of law applicable to the case, the reviewing court must affirm, even if the trial court gave an incorrect reason for the ruling. *See Young v. State*, 283 S.W.3d 854 (Tex. Crim. App. 2009); *Romero v. State*, 800 S.W.2d 539, 543-44 (Tex. Crim. App. 1990); *Spann v. State*, 448 S.W.2d 128 (Tex. Crim. App. 1969); *Moreno v. State*, 341 S.W.2d 455 (1961).

The appellant has failed to show that he was harmed by the admission of the cell site location information.

Generally, a search conducted without a warrant is unreasonable and is prohibited by the Fourth Amendment. U.S. CONST. amend. IV; *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973); *Reasor v. State*, 12 S.W.3d 813, 817 (Tex.

Crim. App. 2000). But in a series of precedents dating back to 1976, the Supreme Court held that "a person has no legitimate expectation of privacy in information...voluntarily turn[ed] over to third parties," "even if the information is revealed on the assumption that it will be used only for a limited purpose." *Smith v. Maryland*, 442 U.S. 735, 743–44 (1979); *United States v. Miller*, 425 U.S. 435, 443 (1976). Thus, under the third-party doctrine, a warrant is not necessarily required for information that has been disclosed to a third party. *Id*.

The third-party doctrine has limits. In *Carpenter v. United States*, 138 S.Ct. 2206 (2018), prosecutors were granted court orders to obtain the defendant's cell phone records, including his CSLI. Wireless carriers produced the CSLI for Carpenter's cell phone, and the Government was able to obtain his location points over the course of 127 days. *Id.*, 138 S.Ct. at 2212. Carpenter moved to suppress the data, arguing that the Government's seizure of the records without obtaining a warrant supported by probable cause violated the Fourth Amendment, and the Supreme Court agreed. *Id.*

The *Carpenter* Court reasoned that mapping a cell phone's location over the course of 127 days provided an "intimate window into a person's life, revealing not only his particular movements, but through them his 'familial, political, professional, religious, and sexual associations.'" *Id.*, 138 S.Ct. at 2217 (quoting *United States v. Jones*, 565 U.S. 400, 415 (2012)). The Court explained that its

decision was a "narrow one" that did "not disturb the application of *Smith* and *Miller*..." *Id.*, 128 S. Ct. at 2220; *cf. Smith*, 442 U.S. at 745 ("petitioner in all probability entertained no actual expectation of privacy in the phone numbers he dialed, and [] even if he did, his expectation was not 'legitimate.'").

In the present case, prosecutors were granted a court order to obtain the appellant's cell phone records, including CSLI. (Ct. Ex. 1). They obtained 206 days' worth of data (RR. X – 346) (RR. XI – 233-234). Thus, this case appears to be factually similar to *Carpenter*. More germane to the current issue before this Court, the Texas Constitution now requires a search warrant for CSLI when at least 127 days of CSLI is obtained and no other exception to the warrant requirement applies. *Carpenter*, 138 S.Ct. at 2217; *Hankston*, 517 S.W.3d at 113 ("We hold that Appellant's rights pertaining to call logs and cell site location information possessed by a third party are the same under both the Fourth Amendment and under Art. I, § 9."); *Heitman v. State*, 815 S.W.2d 681, 690 (Tex. Crim. App. 1991) ("The federal constitution sets the floor for individual rights; state constitutions establish the ceiling.").

The acquisition of evidence in violation of the Texas Constitution does not automatically require the suppression of evidence or the reversal of a conviction. As this Court has repeatedly recognized, the Texas Constitution does not contain its own exclusionary rule. *McClintock v. State*, 541 S.W.3d 63, 66 (Tex. Crim. App.

2017) ("Prior to the advent of Article 38.23, this Court had recognized no state exclusionary remedy in Texas.[] We still have not fashioned a judicial exclusionary rule. The scope of the current state exclusionary rule is, therefore, purely a function of our construction of the statute.") (citation omitted); *Perez v. State*, 11 S.W.3d 218, 223 (Tex. Crim. App. 2000) ("Whether a violation of [Article 1, Section 9] (e.g. an unreasonable search) results in the suppression of evidence obtained as a result of that violation (i.e. employment of an exclusionary rule) is a separate, collateral issue not encompassed by the right granted in that constitutional provision.") (Keller, J., concurring in the judgment); *see also Miles v. State*, 241 S.W.3d 28, 33–34 (Tex. Crim. App. 2007) (discussing history of exclusionary rule). Therefore, criminal defendants must rely on the application of Article 38.23 to obtain the suppression of evidence obtained in violation of the Texas Constitution. *McClintock*, 541 S.W.3d at 66.

This Court has stated that, "except for certain federal constitutional errors labeled by the Supreme Court as 'structural,' no error, whether it relates to jurisdiction, voluntariness of a plea, or any other mandatory requirement, is categorically immune to a harmless error analysis." *Cain v. State*, 947 S.W.2d 262, 264 (Tex. Crim. App. 1997). Therefore, assuming there was a violation of Article 38.23, this Court must apply Rule 44.2(b) of the Texas Rules of Appellate Procedure and determine whether the admission of the CSLI affected the

appellant's substantial rights. TEX. R. APP. P. 44.2(b); *Chavez v. State*, 91 S.W.3d 797, 800 (Tex. Crim. App. 2002) ("The failure of a trial court to adhere to a statutory procedure related to a constitutional provision is a violation of the statute, not a violation of the constitutional provision itself."); *see also McCuller v. State*, 999 S.W.2d 801, 805 (Tex. App.—Tyler 1999, pet. ref'd) (holding that admission of evidence in violation of Article 38.23 is non-constitutional harm).

Rule 44.2(b) of the Texas Rules of Appellate Procedure provides that any non-constitutional "error, defect, irregularity, or variance that does not affect substantial rights must be disregarded." TEX. R. APP. P. 44.2(b). A substantial right is affected when an error has a substantial, injurious effect or influence in determining the jury's verdict. *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997). In making this determination, this Court should consider: (1) the character of the alleged error and how it might be considered in connection with other evidence; (2) the nature of the evidence supporting the verdict; (3) the existence and degree of additional evidence indicating guilt; and (4) whether the State emphasized the complained of error. *Gonzalez v. State*, 544 S.W.3d 363, 373 (Tex. Crim. App. 2018). If, on the record as a whole, it appears the error "did not influence the jury, or had but a slight effect," this Court must consider the error harmless and allow the conviction to stand. *Johnson v. State*, 967 S.W.2d 410, 417 (Tex. Crim. App. 1998).

The weight of the evidence of the defendant's guilt is a relevant factor in conducting a harm analysis under Rule 44.2(b). *Motilla v. State*, 78 S.W.3d 352, 360 (Tex. Crim. App. 2002). In the present case, the evidence supporting the appellant's guilt was overwhelming, even without the admission of the CSLI. Brown's harassment of Jordan provided a compelling motive for the appellant to commit the murder (RR. X – 16, 27, 351). There was a witness who made eye contact with the appellant immediately before the murder, saw that he was holding a firearm at the front door, identified him at trial, and could not be effectively impeached by the appellant (RR. IX – 120-122, 126-130, 136-137, 189). Jordan testified that she heard the gunshots, but the appellant was not with her at the time of the murder (RR. X – 58-59). Finally, both the appellant and his car matched the descriptions given by witnesses of a suspect who had fled from the scene immediately after the murder (RR. X – 184). Thus, there was a large amount of credible evidence supporting the verdict and indicating guilt apart from the CSLI.

Regarding the character of the alleged error and how it might be considered in connection with other evidence, the CSLI was mostly corroborative of the eyewitness testimony and the call logs, but that evidence needed little corroboration. While the jury demanded numerous items of evidence during their deliberations, they never specifically asked for the location data (CR – 160-167). Furthermore, the State paid no special emphasis to the CSLI.

The prosecutor's closing argument at the guilt stage occupied just eight full pages of the reporter's record (RR. XII – 135-144). Only twice during that argument did the prosecutor reference the appellant's location that was known solely by the CSLI (RR. XII – 137, 139) ("The defendant goes to her apartment, which is in the area, which is confirmed by the cell site information…At 9:32 p.m. he's leaving that area and he doesn't move again until 10:00 o'clock."). There were some other references to the appellant's location during the State's argument, but those references were either explicitly or implicitly based on the testimony and the call logs, not necessarily the CSLI (RR. XII – 136, 137, 138, 139) ("But he makes the 911 call at 9:32 p.m., and 7 seconds...At 9:32 p.m. p.m., the defendant was fleeing Groton Drive in his burgundy Honda…And then we know that the defendant at some point is at her apartment when the police arrive. You heard about that from Crystal.… At 9:19 p.m., there's a call between the defendant and Crystal Jordan. What does that tell you. They're not together at 9:16 p.m. and 9:19 p.m…Why are they calling each other? They're not together…They're not together if you look at the cell phone records. There's no way, because they're calling each other."). Finally, the prosecutor did mention the CSLI when summing up the evidence (RR. XII – 143) ("You have to put it altogether like a puzzle, piece by piece by piece. The motive, the car, the description, the cell site, the call records, all of it, one stacked on top of the other and the other and the other. And

then you get the identification. The identification supports all the other evidence."). But even that mention merely emphasized that the CSLI was just one small piece of circumstantial evidence showing that the appellant's cell phone was "in the area" at the time of the murder.

It is unlikely that the admission of the CSLI had more than a slight effect on the jury's verdict. The court of appeals would certainly have affirmed the conviction had they reached the issue of harm, and this Court should affirm on those grounds. *See Gilley v. State*, 418 S.W.3d 114, 119 (Tex. Crim. App. 2014). ("when the proper disposition of an outstanding issue is clear, we will sometimes dispose of it on discretionary review in the name of judicial economy"); *Vega v. State*, 394 S.W.3d 514, 521 n.27 (Tex. Crim. App. 2013) ("We here exercise our inherent authority to make an initial harm analysis because both parties have fully briefed the issue of harm, and the record clearly demonstrates that the error is harmless."). Therefore, the appellant's conviction should be affirmed.

Even if this Court believes that the appellant's right to a search warrant should be reviewed for constitutional harm, this Court should nevertheless affirm the conviction because the court of appeals could easily have determined "beyond a reasonable doubt that the error did not contribute to the conviction or punishment." TEX. R. APP. P. 44.2(a); *see Wall v. State*, 184 S.W.3d 730, 746 (Tex. Crim. App. 2006).

Under Rule 44.2(a), a reviewing court must "calculate, as nearly as possible, the probable impact of the error on the jury in light of the other evidence." *McCarthy v. State*, 65 S.W.3d 47, 55 (Tex. Crim. App. 2001); *Wesbrook v. State*, 29 S.W.3d 103, 119 (Tex. Crim. App. 2000). If there is a reasonable likelihood that the error materially affected the jury's deliberations, then the error is not harmless beyond a reasonable doubt. *Wall*, 184 S.W.3d at 746. A finding of harmless error means that the nature of that evidence is such that it could not have affected the jury's deliberations or verdict. *Id.* The presence of other overwhelming evidence that was properly admitted which supports the material fact to which the inadmissible evidence was directed may be an important factor in the evaluation of harm. *Id.*

As stated previously, the CSLI was just one small piece of circumstantial evidence showing that the appellant's cell phone was "in the area" at the time of the murder. There was other overwhelming evidence supporting the finding of guilt. Brown's harassment of Jordan provided a motive for the murder (RR. X – 16, 27, 351). A credible eyewitness made eye contact with the appellant immediately before the murder, saw that he was holding a firearm at the front door, identified him at trial, and could not be effectively impeached by the appellant (RR. IX – 120-122, 126-130, 136-137, 189). Jordan testified that she heard the gunshots, but the appellant was not with her at the time of the murder (RR. X – 58-

59). A flurry of phone calls between the appellant and Jordan occurred in the 23 minutes after the murder, which the busiest 23 minutes of activity for the appellant in seven months' worth of phone records (RR. X – 344-346) (RR. XI – 289, 312) (St. Ex. 76). Finally, both the appellant and his car matched the descriptions given by witnesses of a suspect who had fled from the scene immediately after the murder (RR. X – 184). Thus, there was a large amount of credible evidence supporting the verdict and indicating guilt apart from the CSLI. The nature of that evidence is such that it could not have affected the jury's deliberations or verdict, and the appellant's conviction should be affirmed.

PRAYER

It is respectfully requested that the opinion of the court of appeals and the conviction of the trial court should be affirmed.

KIM OGG
District Attorney
Harris County, Texas

/s/ Eric Kugler
ERIC KUGLER
Assistant District Attorney
Harris County, Texas
1201 Franklin, Suite 600
Houston, Texas 77002
(713) 755-5826
kugler_eric@dao.hctx.net
TBC No. 796910

CERTIFICATE OF SERVICE AND COMPLIANCE

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Angela Cameron
Assistant Public Defender
Harris County, Texas
1201 Franklin, 13th Floor
Houston, Texas 77002
Angela.Cameron@pdo.hctx.net

Stacy Soule
State Prosecuting Attorney
P.O. Box 13046
Austin, Texas 78711
Stacy.Soule@SPA.texas.gov

/s/ Eric Kugler
ERIC KUGLER
Assistant District Attorney
Harris County, Texas
1201 Franklin, Suite 600
Houston, Texas 77002
(713) 755-5826
TBC No. 796910

Date: November 9, 2018